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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1629

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, et al.,

Petitioners,

v.

DEBORAH A. NORTHCROSS, et al.

No. 79-1630

CITY OF MEMPHIS, et al.,

Petitioners,

v.

DEBORAH A. NORTHCROSS, et al.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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October Term, 1979

No. 79-1629

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BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, et al.,

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CITY OF MEMPHIS, et al.

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==========

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION TO CERTIORARI

Deborah A. Northcross, et al., plaintiffs below, respectfully request that the Court deny

the petitions for writs of certiorari filed by the Board of Education of the Memphis City Schools, et al. ["Board"], No. 79-1629, and the City of Memphis, et al. ["City"], No. 79-1630, seeking review of the Sixth Circuit's judgment and opinion reported at 611 F.2d 624 (23 Nov. 1979), Pet. App. 1-A to 35-A.[1/]

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The judgment below disposed of consolidated appeals from two separate orders of the district court ruling on applications of plaintiffs in this longstanding school desegregation action for awards of costs, including reasonable attorneys' fees and out-of-pocket expenses. The principal appeal below, concerns the district court's 4 November 1977 "Award on Application of the Plaintiffs for Attorneys Fees" (Pet. App. 53-A [hereinafter, "first award"], granting in part and denying in part the request for fees and expenses from both the Board and the City covering the period from the commencement of the litigation through October 1976. The second appeal below,

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1/ "Pet. App." refers to the separately-presented appendix filed by the Board in No. 79-1629.

concerned the district court's 7 July 1978 "Ruling on Application for Attorneys Fees and Expenses for May 1977 Hearing" (Pet. App. 63-A) [hereinafter, "second award"], granting in part and denying in part the request for fees and expenses from the Board alone related to a five-day hearing held in May 1977. On appeal from the first award, the court of appeals remanded the case for further consideration in accordance with its opinion. Pet. App. 28A, 34-A. On appeal from the second award, the court of appeals remanded with instructions to enter for plaintiffs in an amount specified. Pet. App. 34-A.

The two sets of petitioners seek to present a wide variety of issues, numbering twelve in all, to this Court for decision. Many of the legal "questions" which they posit arise only as a result of petitioners' strained reading of the court of appeals' ruling: for example, the claim that the decision below withdraws all discretion from the district court on remand. Fairly construed, the ruling below presents two unexceptionable questions.

1. Whether the court of appeals erred in remanding the major part of the case (the first award) for entry of findings and conclusions which would enable intelligent review of any award?

2. Whether the court of appeals abused its discretion in determining the amount of fees on a small part of the case (the second award) presented for review on a complete and fully litigated record?

Statement

A detailed description of the proceedings in the district court and the court of appeals leading to entry of the judgments of which review is sought appears as an appendix to this Brief at pp. 1a-20a infra. The essential elements of this case are as follows:

From its commencement in 1960 until the present day, this suit has involved but a single claim for relief: the effective dismantling of the state-imposed dual school system in Memphis, Tennessee. After Brown v. Board of Educ., 347 U.S. 483 (1954), 349 U.S. 294 (1955), the board of education refused to plan for the education

of its black and white children together until forced to do so by court orders issued in this litigation. See, e.g., Northcross v. Board of Educ., 302 F.2d 818 (6th Cir.), cert. denied, 370 U.S. 944 (1962); id., 333 F.2d 661 (6th Cir. 1964).

A decade ago this Court summarily reversed a court of appeals decision and directed that prompt action be taken to complete the conversion of the Memphis public schools to a unitary system. Northcross v. Board of Educ., 397 U.S. 232 (1970). Subsequently, the case was again brought to this Court by the plaintiffs after the court of appeals denied a request for an award of attorneys' fees covering one appellate proceeding without "stat-[ing] reasons for the denial [making it] ... not possible for this Court to determine whether the Court of Appeals applied the proper standard in reaching this result." Northcross v. Board of Educ., 412 U.S. 427, 427-28 (1973)(per curiam).

Thereafter, the district court approved a "final" plan of desegregation for the system ("Plan Z"), the Sixth Circuit affirmed, and this Court denied review. Northcross v. Board of Educ., 489 F.2d 15 (6th Cir. 1973), cert. denied,

416 U.S. 962 (1974). At this first respite in what the court below correctly described as this continuous course of litigation, see Pet. App. 3-A, plaintiffs sought to obtain agreement on an appropriate award of attorneys' fees; and when negotiations proved unavailing, filed their motion for an award of costs including reasonable counsel fees -- which led ultimately to the judgments now under consideration.

The main subject of this litigation was far from quiescent, however. Mindful of this Court's admonition, Raney v. Board of Educ., 391 U.S. 443 (1968), the district court had retained jurisdiction over the case to insure that its decree was implemented and proved actually effective. Each year after it had approved a "final" desegregation plan, the district court was confronted with a request from the Board of Education to make a series of modifications to that plan. In the spring of the fourth year of Plan Z's operation, the district court concluded in an opinion issued 24 May 1977 that the Board had failed to establish a unitary school system and, in fact, had engaged in fresh, post-judgment acts of purposeful racial discrimination in the operation of the

public schools of Memphis. This determination was not appealed.

The current controversy stems from the district court's subsequent award of attorneys' fees to counsel for plaintiffs, who were "prevailing parties" with respect both to the main part of the case resulting in entry of the "final" plan of desegregation and also with respect to the post-judgment proceedings in 1977.

As set forth in greater detail in the appendix hereto, at pp. 5a-9a infra, the district court utterly failed -- despite the lesson of this Court's holding in Northcross v. Board of Educ., 412 U.S. 427 (1973) -- to explain the process by which it determined upon the services for which counsel would be compensated by an award of fees pursuant to § 718 of the Education Amendments of 1972, 20 U.S.C. § 1617 (1976), except that the services of certain counsel for the plaintiffs were regarded as completely unnecessary and not subject to any compensation. Nor did the trial court clarify the basis for the determination of the hourly rates at which time expended by counsel for the plaintiffs was to be compensated.

Plaintiffs appealed the adequacy of both fee awards made by the district court. After briefing and oral argument, the Sixth Circuit "conclude[d] that both orders granting attorneys' fees and expenses provide inadequate compensation, contain legal errors, and reach factual conclusions not supported by the record." Pet. App. 10-A. Since the record on the first award was not in a posture for final disposition (see note 4a infra), the court remanded the principal part of the case "for further proceedings in accordance with the standards set out in this opinion." Id. The record on the second award for the 1977 post-judgment proceedings was "adequate ... for us to independently assess an appropriate award, ... and we do so to demonstrate the findings and conclusions which we hold the district courts must enter in the record in making fee awards." Id.

The basic legal principles applied by the court below are as follows: (1) In accordance with this Court's ruling in Bradley v. School Bd. of Richmond, 416 U.S.696 (1974), both the Education Amendments of 1972, 20 U.S.C. § 1617 (1976) and the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976) authorize an award

of fees in this litigation for services rendered prior to their enactment to pending cases such as the instant action. (2) Under the 1976 Act, plaintiffs who prevailed in this litigation are entitled to counsel fees covering all necessary services "as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter," Pet App. 19-A, in reliance on express legislative history. S. REP No. 94-1011, 94th Cong., 2d Sess. 6 (29 June 1976). Further, "the hours claimed need not be automatically accepted by the district court, but to the extent that hours are rejected, the court must indicate some reason for its action. ... Hours may be cut for duplication, padding or frivolous claims." Pet. App. 20-A. Since in its first award, the district court had "simply eliminated, without comment, hundreds of hours of documented service," the court remanded that part of the case "for entry of findings of fact and conclusions of law adequate to permit our review of the award." Pet. App. 19-A to 21-A. (3) In determining the appropriate rate of compensation, the "fair market value of the services provided" (Pet. App. 23-A) is the appropriate standard to implement the intent of Congress.

REASONS FOR DENYING THE WRITS

The court of appeals has written an eminently sensible opinion[2/] when confronted with a district court disposition that kept the appellate body "completely in the dark"[3/] as to the bases for decision, but which on its face was contrary to the will of Congress.[4/] The court of appeals did no more than establish a straightforward framework for determining awards of fees based initially on hours claimed and normal hourly rate

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2/ The petitions before the Court are devoid of citations to the opinions of the lower courts. Petitioners' sweeping characterizations of the actions of the courts below are not supported by an examination of what those courts actually did and said.

3/ Evans v. Sheraton Park Hotel, 503 F.2d 177, 188 (D.C. Cir. 1974).

4/ Apparently the Sixth Circuit has frequently found itself in this situation. The court of appeals stated: "This Court has been disturbed by the extraordinary variations in fee awards that have come before it on review, and by a marked failure on the part of the district courts to explain their reasoning, making necessary findings of fact, or demonstrate the calculations used to arrive at a fee. Such awards may well constitute an abuse of discretion while rendering the award virtually unreviewable." Pet. App. 20-A.

of counsel, with articulated adjustments upward or downward for such factors as contingency or duplication of effort. In this context, there is no merit to petitioners' complaint (Board Pet. 15) that the court of appeals has usurped the prerogatives of the district court.[5/] Plainly, it was not error to remand the major part of the case (the first award) for intelligible disposition, and it is noteworthy that at least as much remains to be decided in this case on these issues as has been decided to date, see pp. 12a-18a, infra. It is just as difficult to see how the court of appeals erred, with reference to a small aspect of this extensive litigation (the second award), by applying the standards it articulated for the benefit of the district judges in the Sixth Circuit, including this district court on remand. The determination of fees simply does not rise to

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5/ The second award was fully litigated in the district court and both plaintiffs and the Board appealed. The Board did so much as even suggest to either the district court or the court of appeals that a transcript of the five-day May 1977 hearing was necessary to proper disposition of any aspect of the fees dispute. The Board's current contention that such transcript is indispendable (Board Pet. 15) comes too late in the day; it attempts to inject an issue not litigated below in any fashion.

an abuse of discretion. Other circuits, some of them even in highly visible landmark decisions have attempted to deal with the details of fees determinations in a similar manner.[6/]

With respect to the decision of the court of appeals to remand the major part of the case, that decision is "not yet ripe for review by this Court," Brotherhood of Locomotive Firemen and Enginemen v. Bangor Aroostook R. Co., 389 U.S. 327 (1967), and the interlocutory nature of a decree is "a fact that of itself alone furnishe[s] sufficient ground for the denial of the application" for certiorari. Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 258 (1916).

Under the opinion below the district court retains ample discretion "to assure fundamental fairness to a defendant" (Board Pet. 12), which,

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6/ See, e.g., Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974); Lindy Bros. Builders, Inc. v. American Rad. & Stand. Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) (Lindy I); City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) (Grinnell I); Lindy II, 540 F.2d 102 (3d Cir. 1976) (en banc); Grinnell II, 560 F.2d 1093 (2d Cir. 1977); King v. Greenblatt, 560 F.2d 1024 (1st Cir. 1977), cert. denied, 438 U.S. 916 (1978).

we might add, appears here as a proven "violator of federal law." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978). Nevertheless "the [school desegregation] plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" Id.[7/] In § 1988 Congress directed that prevailing school desegregation plaintiffs' lawyers should have their fees fixed "by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases." See Pet. App. 12-A. Antitrust and similar commercial cases are legion in which lawyers comparably skilled and experienced to plaintiffs' chief trial counsel have been awarded much more than the base rate of $125/hr. which the court below, on a complete record,[8/] found reason-

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7/ The Senate considered, and rejected by a vote of 50-32, a proposed amendment of § 1988 that would have excluded school desegregation cases from the statute's coverage. 122 CONG. REC. S16451, S16457 (daily ed. 29 Sept. 1976); See also H.R. REP. NO. 94-12558, 94th Cong., 2d Sess. 4-5, 7 (15 Sept. 1976); 122 CONG. REC. H12159 (daily ed. 1 Oct. 1976) (remarks of Rep. Drinan).

8/ The reasonableness of the hourly rate claimed by plaintiffs' chief counsel was attested to by

able for court room work.[9/]

On the issue of compensating prevailing parties' counsel "for all time reasonably expended on the matter,"[10/] petitioners' asserted conflict

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8/ cont'd.

the affidavits of three prominent Memphis attorneys; the Board presented no countervailing evidence on this issue.

9/ Compare, e.g., Shapiro v. Consolidated Edison Co., CCH Fed. Sec. L. Rep. ¶ 196, 364 (S.D. N.Y. 1978); Frankenstein v. McCrory, 425 F. Supp. 762 (S.D.N.Y. 1977); Quirke v. Chessie Corp., 368 F. Supp. 558 (S.D.N.Y. 1974); Arenson v. Board of Trade, 372 F. Supp. 1349 (N.D. Ill. 1974); TWA v. Hughes, 312 F. Supp. 478 (S.D.N.Y. 1970); City of Philadelphia v. Chas. Pfizer Co., 345 F. Supp. 454 (S.D.N.Y. 1972); Colson v. Hilton Hotels Corp., 59 F.R.D. 324 (N.D. Ill. 1972); Oppenlander v. Standard Oil Co., 64 F.R.D. 597 (D. Colo. 1974); Hew Corp. v. Tandy Corp., 480 F. Supp. 758 (D. Mass. 1979).

10/ The court of appeals' standard is taken verbatim from S. REP. NO. 94-1011, 94th Cong., 2d Sess. 6 (29 June 1976), which in turn quoted the holdings in Davis v. County of Los Angeles, 8 EPD ¶ 9444 (C.D. Calif. 1974), and Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.C. Calif. 1974). In Stanford Daily, 64 F.R.D. at 684, at the page cited in the legislative history, the district court rejected the position taken by some federal courts, "that hours spent on the litigation of un-

among the circuits is considerably more imaginary than real. The two courts of appeals and four district courts which petitioners cite (Board Pet. 11-12; City Pet. 17-18) in fact are not in conflict with the ruling below.[11/] Moreover, the courts which have expressly considered the applicable legislative history are in complete agree-

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10/ cont'd.

successful claims should be deducted from the number of hours which an attorneys' fees award is computed." The Court held: "However, several recent decisions, adopting a different tack, deny fees for clearly meritless claims but grant fees for legal work reasonably calculated to advance their clients' interests. These decisions acknowledge that courts should not require attorneys (often working in new or changing areas of the law) to devine the exact parameters of the courts' willingness to grant relief." This was (and is) the usual rule in non-civil rights cases. See, e.g., Locklin v. Day-Glo Color Corp, 429 F.2d 873 (7th Cir. 1970), cert. denied, 400 U.S. 1020 (1971); Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1970); McGowan v. King, Inc., 569 F.2d 845 (5th Cir. 1978). See also, e.g., Palmer Rodgers, 10 EPD ¶ 10,499 (D. D.C. 1975); Walker v. Ralston Purina Co., 409 F. Supp. 101 (M.D. Ga. 1976); cf. United States v. Mitchell, 580 F.2d 789 (5th Cir. 1978).

11/ The circuit decisions relied upon by petitioners are Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978), and Schaeffer v. San Diego

ment with the Sixth Circuit.[12/] Congress did no more than adopt the general rule extant at the

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11/ cont'd.

Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972) (a pre-§ 1988 case construing Title VII). These decisions are wholly distinguishable from the instant case on the simple ground that they involved multiple claims for relief, on only one or a few of which plaintiffs prevailed, whereas this case involves a single claim for school desegregation on which plaintiffs entirely prevailed. The First Circuit has made it clear that it does not disagree with the Sixth Circuit's approach below. In Lamphere v. Brown Univ., 610 F.2d 46, 47 (1st Cir. 1979), the court cited and distinguished its earlier decision in Nadeau as follows:

> Also, it was not error to award fees for the time spent by counsel in an unsuccessful attempt to broaden the scope of remedies available under the decree. This issue was all part of and parcel of one matter -- counsel should not be penalized for every lost motion. This is not the same as a case where claims are truly fractionable. Cf. Nadeau v. Helgemor, 1 Cir., 1978, 581 F.2d 275.

The district court decisions relied upon by petitioners are similarly distinguishable as cases "where claims are truly fractionable."

12/ See, e.g., Brown v. Bathke, 588 F.2d 634 (8th Cir. 1978); Donaldson v. O'Connor, 454 F. Supp. 311 (N.D. Fla. 1978).

time it passed § 1988 (see note 10, supra), and the Sixth Circuit did no more than adhere to clear congressional design and intent. "The statute calls for a reasonable fee, not a bargain-basement figure.[13/] The Sixth Circuit has left intact the traditional discretion of district courts in these matters; the court has simply recognized that "such discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" Albemarle Paper Co., v. Moody, 422 U.S. 405, 416 (1975).

Finally there is no validity to the Board's contention (Pet. 13-14) that the application of § 1988 and § 1617 to this continuously active case is inconsistent with this Court's decision in Bradley v. School Bd. of Richmond, 416 U.S. 696 (1974).[14/] We have repeatedly challenged the Board

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13/ Cf. Pitchford Scientific Inst. Corp. v Pepi, Inc., 440 F. Supp. 1175, 1177 (W.D. Pa. 1977).

14/ Wheeler v. Durham City Bd. of Educ., 585 F.2d 618 (4th Cir. 1978), is not contrary. There the case had become dormant then the fee statute was passed, and there was no pending litigation over any issue. This case, in total contrast, was the subject of active, heated litigation when both applicable fee statutes were enacted. See Hutto v. Finney, 437 U.S. 678, 694-95 n.23 (1978).

to allege the prejudice and injustice necessary to fit the "manifest injustice" exception to the Bradley rule, but the Board has failed to respond and it does not respond here. Nowhere does the Board claim that if it had known of its potential statutory liability for fees, "rather than simply the common-law availability of an award, [such knowledge] would hve caused the Board to order its conduct so as to render this litigation unecessary and thereby preclude the incurring of such costs." Id at 721. To the contrary, the Board's effort to undermine the desegregation plan in the spring of 1977, well after the passage of both § 1617 and § 1988, demonstrates that knowledge of potential attorneys' fees liability had no impact on the conduct of this board of education. The court of appeals was manifestly correct in concluding that there is a complete absence of prejudice to the Board. Pet. App. 17-A.

This case does not merit review by this Court.

14/ cont'd.

There are probably more than 100 lower court decisions in accord with the Sixth Circuit's decision in this case.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Dated: 13 May, 1980

Respectfully submitted,

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Appendix

APPENDIX

The "long, complicated history of this bitterly contested school desegregation case" (Pet. App. 2-A) may be traced through the reported opinions of this Court (which has twice granted review), the Court of Appeals for the Sixth Circuit (ten reported decisions), and the district court (innumerable decisions and orders). See e.g., Board Pet. 2.[1a/] A "general description," sufficient "to give an understanding of the scope and quality of representation provided by the plaintiffs' attorneys in the course of the last two decades" (Pet. App. 2-A to 3-A), is set out in the opinion below. Pet. App. 3-A to 4-A.

The First Application and Award

Two weeks after this Court declined to review the final plan of desegregation ordered by the district court, 416 U.S. 962 (22 April 1974),

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1a/ A comprehensive summary of the history of this litigation takes up nearly 50 pages of our opening Brief for Plaintffs-Appellants, filed in the court below, 6th Cir Nos. 78-1289,-1290,-1291 (served 4 December 1978).

plaintiffs' counsel wrote counsel for the Board, initiating an effort to settle plaintiffs' claim for costs, including reasonable attorneys' fees and out-of-pocket expenses. When these efforts failed, plaintiffs filed a formal motion for such an award, against both the Board and the City on 1 August 1974. Protracted litigation over the fees issues then ensued.

The district court's 24 March 1976 "Ruling on the Application of Plaintiffs for Attorneys Fees" addressed plaintiffs entitlement to an award of fees. The court held: (1) that, as to the Board defendants, plaintiffs are the "prevailing party" and otherwise fulfilled the requirements of § 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (Pet. App. 42-A); (2) that § 1617, as construed in Bradley v. School Bd. of Richmond, supra, authorizes an award only for services rendered after the effective date of the statute, 1 July 1972, because (a) there was on that date no application for fees "pending under circumstances wherein it was subject to a direct appellate review" (Pet. App. 44-A) or (b) in the alternative, because under the standard enunciated by the law of this case, Northcross v. Board of Educ. of the Memphis City Schools, 412 U.S. 427 (1972), "the lack of specific guidelines and the resulting

trial and error experimentation [in school desegregation cases], coupled with the fact that the plaintiff never applied for any attorneys fees prior to the latter part of 1972, are circumstances which would make a retroactive award unjust" (Pet. App. 48-A); (3) that, additionally as to the Board defendants, plaintiffs are entitled to an award of fees for services rendered after the decisions in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (April 20, 1971), and companion cases, because the Board's litigation conduct in response to those decisions was "obstinate and obdurate" (Pet. App. 45-A to 46-A); and (4) that plaintiffs are entitled to recover fees as part of the costs to be assessed against the City defendants under both § 1617 and the "obstinate and obdurate" standard. Pet. App. 49-A to 51-A.

Thereafter, plaintiffs documented over 4,800 hours[2a/] of services rendered by plaintiffs' law-

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2a/ Nearly 4,000 hours were in connection with proceedings arising out of plaintiffs' 1968 Motion for Further Relief. The 1968 motion was filed pursuant to this Court's decision in Green v. County School Bd., 391 U.S. 430 (1968), and companion cases. In its 24 March 1976 ruling the

yers in litigation against the City. Plaintiffs also amended their application to include reliance on intervening legislation, the Civil Rights Attorney's Fees Awards Act of 1976, amending 42 U.S.C. § 1988. Plaintiffs supported their application with a detailed factual presentation: answers to interrogatories; a 14-page stipulation of facts pertaining to the City, along with an agreed 7-page pre-hearing order designating relevant parts of the record; nearly 100 pages of affidavits and supporting documentation from counsel for plaintiffs itemizing the necessary services rendered and litigation expenses incurred; of affidavits from three prominent Memphis attorneys familiar with the history of this case

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2a/ cont'd.

district court correctly observed that "the denial of certiorari by the Supreme Court in April 1974 was the culmination of proceedings which were initiated in August 1968 when there was filed on behalf of the plaintiffs a Motion for Further Relief..." Pet. App. 47-A. As the court of appeals described the intervening years: "For the next four and a half years, the case moved at a steady pace back and forth between the district court, this Court [of Appeals] and the Supreme Court, as one phase after another of an effective, comprehensive desegregation plan was hammered out. In 1973, a new twist was added when the City of Memphis attempted to block desegregation...." Pet. App. 3-a.

and with rates charged in the community for complex federal litigation; and of affidavits from out-of-town attorneys familiar with school desegregation litigation in general and with the importance and complexity of this case in particular. In response, the Board filed no affidavits or any other evidence,3a/ and the City filed two affidavits from Memphis lawyers, consisting of a total of three substantive sentences and not referring at all to federal court litigation. In addition, the district court held a hearing on 22 October 1976, resulting in a transcript of 109 pages.

On 4 November 1977 the district court filed this "Award on Application of the Plaintiffs for Attorneys Fees" (Pet. App. 53-A to 62-A), disposing of plaintiffs' claims as follows: (1) the court declined to reconsider its ruling that § 1617 does not authorize fees for services ren-

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3a/ By agreement, the Court was required to respond to plaintiffs' presentation only as it related to services rendered since the Swann decision in 1971. Pursuant to the court of appeals' remand, the Board will now have the opportunity, if it chooses, to respond to the itemizations relating to pre-1971 services.

dered prior to 1 July 1972, and also held 42 U.S.C. § 1988 to be inapplicable,[4a/] thereby denying recovery for about 2,084 hours of services (Pet. App. 55-A); (2) the court awarded $21,490 to two of plaintiffs' attorneys for one-half of 816 hours of services in connection with the Board's "obdurate and obstinate" conduct in the latter half of 1971 and the spring of 1972 (Pet. App. 55-A), and omitted altogether 347 hours of services of these two attorneys during this time frame without any discussion at all;[5a/] (3) the court awarded the same two lawyers $7,200 for one-half of 240 hours of services rendered after 1 July 1972 "because the plaintiffs' [proposed desegregation] plan was rejected and therefore to that extent they did not prevail" (Pet. App. 56-A to 57-A); and omitted, without discussion, 580 hours of services rendered by these attorneys during the same period, as well as 39 hours claimed by a third attorney;[6a/] (4) the court denied recovery of all hours claimed by plaintffs' New York cocounsel associated with the NAACP Legal Defense and Educational Fund, Inc., with the single statement that "there has been no showing that his services were necessary in addition to the services of local counsel" (Pet. App. 58-A)[7a/] (the claim is for 829 hours, of which 619 were in

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4a/ The court had earlier declined to award fees under § 1617 for pre-July 1972 services on the ground that that statute's applicability was "limited to cases where the matter of an award for attorneys fees was pending under circumstances wherein it was subject to a direct appellate review." Pet. App. 44-A. Although this condition was fulfilled by the 1976 amendment to 42 U.S.C. § 1988, passed while the question of fees was pending decision in the district court, the court refused to apply § 1988 on the new ground that "the Judgment in the case had become final in 1974." Pet. App. 55-A).

5a/ The Board appealed the district court's bad faith finding and the limited award of fees based on that finding. The court of appeals pretermitted decision of those issues with its holding that fees for services rendered since 1968 are authorized by statute. The Board has not renewed its position here.

6a/ The district court's award nowhere identifies or discusses the many hours of services which were excluded from compensation altogether. In 31 pages of appendices attached to our opening brief in the court of appeals (see note 1a, supra), we "attempted," in the words of the court of appeals, "largely by guesswork, to identify which hours of service ... were excluded from consideration." Pet. App. 21-A.

7a/ The court of appeals correctly noted that New York counsel "provided the plaintiffs with many hours of service which were not provided by anyone else, particularly in connection with this Court and the Supreme Court." 611 F.2d at 657.

time periods otherwise covered by the court's entitlement ruling); (5) the court awarded against the City $6,930 for over 115 hours of services (out of a claim for over 305 hours) (Pet. App. 58-A to 61-A)[8a/] and $343.26 in costs and expenses;[9a/] (6) the court evaluated the services of the two plaintiffs' lawyers who were allowed fees at a routine hourly rate of $60 per hour for "lead counsel" and $40 per hour for subordinate counsel (Pet. App. 57-A), but summarily declined (Pet. App. 58-A) to consider either the extraordinary circumstances urged by plaintiffs to warrant an upward adjustment in the base rate or the

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8a/ The district court identified the excluded 24 hours of services against the City on grounds of unnecessary duplication. Pet. App. 59-A and 60-A. These findings, the only specific facts found were not disturbed by the court of appeals, but are subject to reconsideration on remand.

9a/ The court, also without findings, awarded plaintiffs part ($8,007.31 of $19,548.77 expended) of their statutory costs and out-of-pocket expenses incurred in litigation against the Board from September 1971 through 1974 (Pet. App. 61-A), and denied, without mention, plaintiffs' claim for $12,619.95 in costs and expenses incurred prior to September 1971. Questions relating to statutory costs and litigation expenses were remanded for reconsideration by the court of appeals (Pet. App. 25-A to 28-A); none of these issues is presented for review here.

extreme inflation of the intervening years which had significantly devalued the 1971-73 rates.[10a/]

A judgment in conformity with this ruling was entered by the district court pursuant to FED. R. CIV. P. 54(b); plaintiffs appealed and both the Board and the City cross appealed.

The Second Application and Award

In the words of the court of appeals (Pet. App. 4-A):

> In the meantime, a new controversy had flared up, when the School Board sought substantial modification of Plan Z which

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10a/ Plaintiffs presented documentation to the district court showing that by 1976 the Board of Education lawyers over the years had been paid -- when their services were rendered, win, lose or draw -- the equivalent of over 350,000 1975 dollars to defend the dual system. Application of the Consumer Price Index increases since 1975 to the same figures (i.e., excluding fees paid by the Board since 1975) results in an amount equivalent to about 550,000 1980 dollars. These dollar figures relate only to attorneys' fees and reveal nothing about the untold worth of the endless hours devoted by the Board's superintendent and his staff to the defense of this litigation.

would have slowed down and undermined the progress of desegregation. A five-day trial was held in 1977, and the defendant's proposals were, for the most part, rejected by the court.

See also Pet. App. 63-A to 64-A. Pursuant to the district court's determination at the conclusion of its 24 May 1977 Memorandum that plaintiffs were the prevailing party entitled to attorneys' fees, plaintiffs documented 271.25 hours of necessary services related to the May 1977 hearing.[11a/]

On the question of amounts to be recovered, the district court entered its ruling on 7 July 1978 (Pet. App. 63-A), awarding $8,382.00 in fees and holding as follows: (1) the court awarded fees for 197.25 hours of the 271.25 hours of services rendered by plaintiffs' attorneys, disapproving, without identification or specific findings, 74 hours of claimed necessary services; (2) as to approved hours, the court (again, without specific findings) employed an across-the-board discount of 20% as "an adjustment [that]

11a/ Plaintiffs made no claim for services related to their separate contention that a new high school (rather than renovation of an existing school) should be built in the Westwood area, except for 2 hours which were inadvertently included in the affidavits and explicitly excluded by the district court. See Pet. App. 65-A to 66-A.

should be made for the time devoted to parts of issues on which the plaintiffs did not prevail" (Pet. App. 66-A);[12a/] (3) while approving the "normal hourly rates" claimed by plaintiffs' attorneys Noel and Fields ($60/hr. and $40/hr., respectively), the court reduced (to $75/hr.) as "excessive" (but without explanation) the base rate ($125/hr.) claimed by plaintiffs' chief trial lawyer Lucas (Pet. App. 66-a);[13a/] (4) the court rejected plaintifff' request for an upward adjustment of the award, stating its "opinion that an incentive or multiplier factor is not authorized or allowed for the services rendered in this

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12a/ For example, plaintiffs opposed the Board's modification and school closing plan in its entirety on the ground that the proposal as a whole was intentionally racially discriminatory, was arbitrary, and portended disruption of desegregated schools which appeared to be stabilized. The district judge agreed with these contentions and entered precise findings and conclusions to this effect, but in the process of separately analyzing each piece of the total package, he found a few proposals so innocuous as not to require disapproval. These are the sorts of "parts of issues" which the plaintiffs are presumed to have lost.

13a/ The rates for Noel and Fields have not been disputed, but the rate for Lucas was reviewed and revised by the court of appeals and the Board makes it an issue here. Board Pet. 15-16.

phase of the case." Pet. App. 66-a.[14a/]

The court of appeals consolidated cross appeals from the first and second awards for argument and decision.

The Decision of the Court of Appeals

In its decision of 23 November 1979, the Sixth Circuit "conclude[d] that both orders granting attorneys' fees and expenses provide inadequate compensation, contain legal errors, and reach factual conclusions not supported by the record." Pet. App. 10-A. Since the record on the first award was not in a posture for final disposition (see note 3a, supra), the court remanded the principal part of the case for further proceedings in accordance with the standards set out in this opinion." Id. The court determined, however, that the record on the second award was "adequate... for us to independently assess an appropriate award,... and we do so to demonstrate

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14a/ On the ground that they were "excessive" or without "justification," the court awarded only one-half of plaintiffs' expenses for expert-witness fees, preparation of a private-school pupil-locator map, and photocopying, thereby awarding $5,200.16 of the $7,788.96 expended by plaintiffs. Pet. App. 67-A to 68-A. The court of appeals sustained all aspects of this holding, except the disallowance of photocopying expenses (Pet. App. 32-A to 33-A), and none of these issues is presented for review.

the findings and conclusions which we hold the district courts must enter in the record in making fee awards." Id. The court said (id.):

> We understand that the findings of fact which are required to substantiate a court's exercise of its discretion in making a fee award are frequently very complicated. Nevertheless, both the court's findings and its mode of analysis must be clear to enable an appellate court to intelligently review the award. The plaintiffs are entitled to some explanation of the reasoning used to exclude those hours which were cut, and some description of the findings which were relied upon to find that expenses and billing rates were excessive. Any review of the court's awards in this case would require substantial amounts of sheer conjecture on our part, as we speculate as to reasons why the court might have cut certain documented hours. In fact, it is impossible to tell whether the district judgement might not have simply overlooked certain services provided by plaintffs' attorneys. Certainly no more substantial reason appeals in this record.

The court of appeals held, first, that 20 U.S.C. § 1617 and 42 U.S.C. § 1988, both enacted while this case was in active litigation, authorize fees for services rendered to plaintiffs since 1968.[15a/] The court elected to focus its decision

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15a/ Because of an unresolved dispute about the meaning of a 1966 order, after which the case was

on the application of § 1988 and its comprehensive legislative history. Pet. App. 11-A. On the basis of this Court's decision in Bradley v. School Bd. of Richmond, supra, and the explicit legislative history of § 1988 that the new statutory authorizations for attorneys' fees apply to all pending cases (cases in which "there was an active controversy ... at the time the Act became effective"), "unless special circumstances exist which would make an award manifestly unjust." Pet. App. 14-A. Applying that standard to this case, the court held that while "[c]ertain interim aspects of the case may have been subject to a final order settling the issue of attorney's fees to that point, rendering the reopening of long-settled aspects of the case unfair" (Pet. App. 16-A), there has been no such order since 1968 in this litigation. In response to the district court's reasons for denying application of the statute, the court held (Pet. App. 17-A and 18-A):

15a/ cont'd.

dormant until plaintiffs filed their Green motion in 1968 (see Pet. App. 3-A), the court of appeals remanded the question of entitlement to fees for pre-1968 services to the district court for further consideration. Pet. App. 17-A to 18-A. That issue is not before the Court.

However, we reject the notion that mere uncertainty in the law is a "special circumstance" justifying rejection of the statutory remedy. A major purpose of the Fees Awards Act was to encourage the bringing of suits in new and undeveloped areas of civil rights law, and it would be anomalous indeed if we were to deny fees for the very reason the statute was passed. Finally, the plaintiffs' delay in applying for fees (which was largely due to the fact that there was no earlier appropriate time to pause for litigation of the fee issue, at least not since 1966) is hardly grounds for denying fees. The defendants have failed to point to any prejudice or harmful effects on them as a result of the plaintiffs' delay. The prejudice, if any, has inured to plaintffs' attorneys who have provided years of service without compensation in hand. This is not a case where, years after a case has been finally disposed of, the prevailing party seeks to reopen the case to litigation of the fees issue. Cf United States v. Pinto, 44 F.R.D. 357 (W.D. Mich. 1968).

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However, from 1968 until shortly before the application for fees was made by the plaintiffs, the case was in continuous, active litigation. Not only was there no "final judgment" which could reasonably be said to settle the issue of fees during that period, but there was not time to raise the matter of fees at all.

Second, the Sixth Circuit held that in this single-claim school desegregation case in which the plaintiffs had "prevailed on the case as a whole" (Pet. App. 18-A) and "obtained the relief which they sought" (Pet. App. 19-A), the district court plainly erred "by deciminating the total hours claimed with arbitrary percentages" to account for "issues or parts of issues" on which plaintiffs had assertedly not prevailed. Pet. App. 18-A and 19-A. supra. The rule adopted, based on the legislative history of § 1988, is that all necessary services are to be compensated, "as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter." Pet. App. 19-A. "The hours claimed need not be automatically accepted by the district court, but to the extent that hours are rejected, the court must indicate some reason for its action.... Hours may be cut for duplication, padding or frivolous claims." Pet. App. 20-A. Since in its first award the district court had "simply eliminated, without comment, hundreds of hours of documented service," the court remanded that part of the case "for entry of findings of fact and conclusions of law adequate to permit our

review of the award." Pet. App.21-A.[16a/]

Finally, the court addressed the appropriate standard for determining a reasonable hourly rate, and concluded that the "fair market value of the services provided" (Pet. App. 23-A) is the appropriate standard to implement the intent of Congress. The court adhered to its earlier decision in Oliver v. Kalamazoo Bd. of Educ., 576 F.2d 714 (6th Cir. 1978), disallowing "a 'bonus' multiplier." Pet. App. 23-A. But the court did recognize (Pet. App. 24-A):

> This does not mean that the routine hourly rate charged by attorneys is the maximum which can or should be awarded. In many cases that rate is not "reasonable," because it does not take into account special circumstances, such as unusual time con-

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16a/ Pursuant to their attempt below to identify the hours excluded without comment by the district court (see note 6a, supra),plaintiffs determined that the district court had eliminated all hours during the period covered by its award relating to monitoring the final desegregation decree (136.8 hrs.), to services rendered on appeal (231.5 hrs.), and hours expended on the litigation of plaintiffs claim for costs and fees (341 hrs.). The court of appeals held that compensation is due for these services (Pet. App.21-A to 22-A), and that holding is not contested here.

straint, or an unusually unpopular cause, which affect the market value of the services rendered. Perhaps the most significant factor in these cases which at time renders the routine hourly fee unreasonably low is the fact that the award is contingent upon success.

The court therefore held that in such appropriate cases an upward adjustment in the routine hourly rate may be necessary in order to arrive at a "reasonable" fee for particular services rendered.

The court then applied these standards to the second award, involving a claim for 271.25 hours of services. The district court had awarded an average of $31/hr. for these services. The court of appeals, finding that "we have a complete record and conclude that the interests of justice will be served, in light of the long delay in this case, by our recalculation of an appropriate award..," (Pet. App. 28-A), scrutinized the record and found the district court's award to be inadequate. Pet. App. 29-A to 32-A. The court therefore made adjustments to the award, the end result of which was to award plaintiffs' attorneys an average of $63/hr. for these services, in contrast to the $31/hr. awarded by the district

court. With respect to the 74 hours of services which the district court had excluded without findings, the court of appeals determined: "Not only is this cut unsupported in the record, but we conclude that it is clearly excessive given the facts of this case" where "there was little overlapping of services." Pety. App. 29-A. (For that "little overlapping" the court reduced the compensable hours by 5%). The court also rejected the district court's 20% reduction allegedly designed to discount for "parts of issues" on which plaintiffs did not prevail. See Pet. App. 18-A.

The court further found that while the normal hourly federal-litigation rate of $125/hr. for plaintiffs' experienced chief trial counsel was "high for office services," it was "reasonable and supported both by the record and our own experience with fees charged by lawyers of his experience and legal stature for trial services." Pet. App. 39-A. In response to plaintffs' contention that there was a high degree of contingency in this aspect of the case because similar though less extensive Board-proposed modifications of the desegregation plan had been approved over plaintiffs' objections during each of the three

preceding years, the court of appeals found that although "there was a real element of contingency as to whether the attorneys would be compensated for their services at all," the contingency element was reduced by other factors, primarily by the fact that "the burden was on the Board" which "here was seeking to alter a final judgment of the district court which had been arrived at only after many years of bitter litigation." Pet. App. 31-A. The court therefore concluded that an award adjustment of only 10% was adequate to arrive at a reasonable fee in light of the contingency factor. Id.[17a/]

The Board (but not the City) petitioned the court of appeals for rehearing, with suggestion for en banc consideration, which was duly denied without dissent.

17a/ The court also affirmed the district court's disposition with respect to costs and out-of-pocket expenses, except for the denial of photocopying costs. These issues are not before the court. See note 17, supra.